Supreme Court, U.S.
FILED

No. 10 813 OCT 16 2010

In The OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

Michael Mirayes

Petitioner

v.

STATE OF NEW JERSEY

Thomas S. Ferguson
Prosecutor
Dit Mosco –A/P
John and Jane (Doe(s) Names
Fictitious, Individually, Jointly,
And Severally,

Respondent(s)

On Petition For Writ Of Certiorari
To The New Jersey Supreme Court
and New Jersey Superior Court of Appeals

BRIEF FOR PETITIONER

Mr. Michael Mirayes
3690 Pine Ridge
Bush Kill, P.A. 18324
(908) 268-8881

QUESTIONS PRESENTED FOR REVIEW

At issue, Petitioners personal firearms were seized and held promulgated by the N.J. Domestic Violence Act of 1991. Petitioner was exonerated of all charges, civil and criminal, and met the standards for return.

Application was made before the New Jersey Superior, Appellate, and Supreme Court's, for there return ,pursuant to the relevant cont olling statutes, which "**mandates**" return of property sized in domestic related situations, and was summarily denied. The questions presented are:

1. Does the Bill of Rights, guarantee equal protection from the government, to arbitrarily and capriciously, infringe upon the fundamental rights to life, liberty and property, devoid evidence of guilt?

2. Does the fourteenth amendment, of the due process clause, make the second amendment, binding upon the States, to keep and bear arms?

PARTIES TO PROCEEDING

Thomas S. Ferguson, at all times herein relevant, was employed as a New Jersey Prosecutor and assigned to the Warren County Prosecutors Office, located at Warren County Court House, Second St. Belvidere, New Jersey 07823.

Dit Mosco, at all times herein relevant, was employed as a New Jersey Assistant Prosecutor and assigned to the Warren County Prosecutors Office, located at Warren County Court House, Second St. Belvidere, New Jersey 07823.

Petitioner Michael Mirayes, at time of incident, was a 19 year veteran , attaining the rank of Sergeant, within the New Jersey State Police, a resident and property owner, residing in the County of Warren located at 205 Pennsylvania Ave. Township of Pohatcong, New Jersey 08865

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N.J.S.A.: 2C: 58-3 (c) 8_____1,5,6,7,8,9,11
Firearms (FPIC) denial statute: Weapons seized in domestic Situations and not returned equates to denial of application for Firearms purchase.

N.J.S.A. 2C: 58-3 (d) _____1,9
Grievance procedure, to the Superior Court, to address denial of Firearms purchaser and Identification Card.

CITATION OF OPINIONS BELOW

New Jersey Supreme Court

Presiding Judge: Hon. Stuart Rabner, Chief Justice, .N.J S.Ct.
N.J. Supreme Court complaint No. 065977 was entered on April 23,2010, and denied on July 19,2010.

New Jersey Appellate Court

Presiding Judges : Hon. Carcham and Parrillo
N.J Appellate Court complaint No. A-5086-08T4 was entered on March 02,2010 and denied on April 09,2010.

New Jersey Superior Court

Presiding Judge: Hon. John H. Pursel ,J.S.C.
N.J. Superior Court complaint No. A-1608-2121 was entered on May 30,2008, and denied on August 15,2008.
N.J. Motion for Reconsideration entered April 30,2009, and was denied on May 15,2009

JURISDICTION STATEMENT

Jurisdiction prevails in this court, pursuant to 28 U.S.C. 1257 (a) (b) on a Writ of Certiorari, in which a decision could be had, or may be reviewed by the U.S. Supreme Court, where the validity of a statute of any state is drawn in question , on the grounds of it's being repugnant to the constitution or laws of the United States, where any title, right, privilege, or immunity is specially set up, or claimed, under the constitution of the United States.

ARGUMENT ALLOWANCE FOR WRIT

Jurisdiction prevails in this Court for a Writ of Certiorari, as a State Court of last resort (New Jersey Supreme Court) decided an important question of Federal Law, pursuant to the U.S. Constitution, that has not been, but should be, settled by this Court.

There are no orders in effect, pending or otherwise granting extensions, or cross petitions related to this case. Jurisdiction prevails in this court, pursuant to 28 U.S.C. 2403 (b).2

STATEMENT OF CASE

The matter in dispute, involves a weapons forfeiture proceeding (which is 10 yrs old & not in force) promulgated by the Domestic Violence Act of 1991 and the issuance of a restraining order in May 2000 which was summarily dismissed favorably to Petitioner without any restrictions or impediments.

N.J.S.A. 2C:58-3(c) of the States Criminal Code Firearms Section identifies who may or may not obtain a firearms purchase permit and identification card, pursuant to the guidelines within the relevant statutes.

Petitioner met the qualifications and made application for a (FPIC) on January 31,2008 to Washington Borough N.J. Police Dept, and it was denied on May 15,2008 pursuant to N.J.S.A. 2C:58-3 c (8), a disability provision which prohibits the issuance of a FPIC to any individual, who's weapons are seized pursuant to the DVA and not returned.

Petitioner appealed his denial, pursuant to section: 58-3(d) of the same statute which provides a cure for any one aggrieved by said statute. He proffers, he has met the necessary qualifications to obtain a FPIC pursuant to the relevant statutes which govern approval. The Court of last Resort, and Lower Courts, have refused to restore that right, predicated upon N.J.S.A. 2C:58-3c (8), by continually denying his appeal to lawfully obtain a FPIC without probable cause.

All Courts have been provided with a plethora of documented evidence and exhibits, within his briefs, and are full aware, no violations or impediments exist to sustain a denial.

They have repeatedly ignored the controlling rules of law, mandating restoration of Petitioners rights, property and issuance of an (FPIC), pursuant to the controlling statutes without just cause.

Petitioner is entitled to restoration of his second amendment right , to lawfully obtain a firearms identification card and purchase permit, pursuant to the relevant statutes, which govern the return of seized firearms in domestic situations

The question in this case concerns,(1) the scope of the equal protection and due process provisions, within the second and fourteenth amendments of the U.S. Constitution.

LEGAL ARGUMENT

Congress held: the Second Amendment to the United States Constitution provides, that the right of the people to keep and bear arms ,"**shall" not** (emphasis added) be infringed. They further held: "The Second Amendment protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms." (See **District of Columbia v. Heller (No.07-290) 478 F.3d 370,) McDonald v. City of Chicago, Ill., U.S.(No.08-1521) 567 F.3d 856,**

This Court in past decisions held in Heller, that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States.

The justices further held: "The Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in Heller."(See *Duncan*, 391 U.S; at 149, 14) (citation omitted).

42 U.S.C. provides: " Section 1983, creates a private right of action to redress deprivations under color of state law of any federal rights, privileges or immunities. The purpose of section 1983, pursuant to the Unites States Supreme Court, was to interpose the Federal Courts between the States and people, as guardians of the people's Federal Rights to protect the people from unconstitutional action under color of state law, whether that action be Executive, Legislative, or Judicial." **(Mitchum v. Foster (1972) 407 U.S.225, 242.)**

The Fourteenth Amendment provides in pertinent part : " The due process of law is a fundamental, constitutional guarantee that all legal proceedings will be fair, and that one will be given notice of the proceedings and an opportunity to be heard before the government acts to take away one's life, liberty, or property." Also, a constitutional guarantee that a law shall not be unreasonable, arbitrary or capricious.

The constitutional guarantee of due process of law, found in the Fourteenth Amendment to the U.S. Constitution, prohibits all levels of government from arbitrarily or unfairly depriving individuals of their basic constitutional rights to life, liberty, and property.

The law ratified in 1868, declares,"[N]or shall any State deprive any person of life, liberty, or property, without due process of law". This clause limits the powers of the states, rather than those of the federal government.

It also has been interpreted by the U.S. Supreme Court in the twentieth century ,to incorporate protections of the bill of rights, so that those protections apply to the states as well as to the federal government.

Thus, the Due Process Clause, serves as the means whereby the Bill of Rights, has become binding on state governments as well as on the federal government. The plain language reading within the context of the equal protection and due process clause clearly encompass the mandatory right of every law abiding citizen to legally own an possess firearms without infringement by the States.

The constitutional guarantee of the due process law, found in the Fifth and Fourteenth Amendment, prohibits all levels of government from intrusion, to arbitrarily or unfairly deprive individuals of their basic right to life, liberty, and property without a trial before a jury of their peers. The question presented in this case is: (2) Does the fourteenth amendment, of the due process clause, make the second amendment, binding upon the States, to keep and bear arms? To ask that question is to answer it : "Yes.".

The Bill is a declaration of rights that are substantially immune from governmental interference, and thus constitutes a reservation of limited individual sovereignty. The due process is not a mechanical instrument. It is not a yard stick, but....It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

SUMMARY OF ARGUMENT

This case requires only the straight forward application of a bedrock principle of statutory construction:

The plain meaning of statutory language should control. Statute N.J.S.A. 2C:58-3(c)(8), a disability provision of the DVA of 1991 and Gun Control Act of 2004, imposes a mandatory denial of firearms purchase permits, and identification cards, to any applicant who's firearms has been seized pursuant to the D V Act of 1991 and not returned, predicated upon sheer fortuity.

The act and statute is discriminatory by it's terms, as it violates the equal protection, and due process laws, guaranteed by the constitution. It is, devoid of probable cause or guilt. The statutes plain language by it's terms, is repugnant to the constitution, as it delimits the jurisprudence and protection of the rights to life, liberty, and property laws, secured by the Bill of Rights and the U.S. Constitution for the following reasons:

POINT ONE

The statutes violates the due process provision secured by the fourteenth Amendment, by imposing a mandatory penalty, without providing fundamental fairness.

POINT TWO

The statutes violates the second amendment right to keep and bear arms explicitly, as they mandate a penalty for deprivation of rights without any underlying cause.

POINT THREE

The statutes do not establish any concrete basis in which, deprivation of constitutional protected rights could with stand strict or statutory scrutiny.

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POINT FOUR

The statutes are repugnant to the constitution, as seizure of weapons and not returned, is not a crime, or statutory offense, which warrants penalization, or deprivation of any secured protected right.

POINT FIVE

The statutes classification scheme, affects the fundamental rights provision protected by the Bill of Rights.

POINT SIX

The statutes do not show any compelling evidence under this classification, that it's necessary to achieve the states interest.

POINT SEVEN

The statute is vague, it does not describe or identify any of the (14) listed offenses , within the DVA, which a seizure would be mandated.

POINT EIGHT

The statute violates the right to be secure in your home and protection of unreasonable searches and seizures, without probable cause.

POINT NINE

The statute violates the right of equal protection secured by the Fourteenth Amendment.

POINT TEN

The statute violates the rights to life, liberty, and property laws, secured by the Bill of Rights and the U.S. Constitution.

The statute at issue, subsection: 58-3(c)(8) provides in relevant part: "No Firearms purchase permit or identification card will be issued to any person whose firearm is seized pursuant to the "Prevention of Domestic Violence Act of 1991,and whose firearm has not been returned."

The Act and statute, are devoid of constitutional perspective. First and foremost, the commission of one of the listed offenses promulgated by the DVA, is necessary for the entry of a domestic violence order. **(See Franklin v. Sloskey, 385 N.J. Super.534, 540,544(App.Div.2006).**

Section 2C: 25-19(a).,list the (14) offenses which must be met for a denial to attach. They are : (1) Homicide ,(2)Assault,(3)Terroristic Threats,(4) Kidnapping (5) Criminal restraint,(6) False imprisonment,(7)Sexual assault, (8)Criminal sexual contact, (9)Lewdness, (10)Criminal mischief,(11) Burglary, (12)Criminal (Trespass,(13)Harassment,(14)stalking.

However, the commission of one of these offenses is not necessarily the equivalent of an act of domestic violence. The Legislative intent does not classify, "a seizure of a weapon or weapons",(emphasis added) that have not been returned, as a criminal offense in which a denial of a FPIC would attach. It should be further noted, the act and statute, are unconstitutional and devoid of perspective application.

The seizure action violates the unreasonable search and seizure provision and due process laws, secured by the Bill of Rights. Applying the merits outlined by the DVA of 1991, clearly exempts Petitioner from the mandatory penalties promulgated by sec: 58-3c (8). Section 2C:25-29 (a) of the DVA, provide in pertinent and relevant part: " A hearing shall be held in the family part of the Chancery Division of the Superior Court **within** (10) days of filing the complaint."

Applying N.J.S.A. 2C: 25-29 to the merits of (statute 58-3c (8) renders the mandatory seizure of firearms and not returning same unlawful, pursuant to the DVA.

The seizure action imposes a severe penalty before a hearing is held, which violates the due process clause of the constitution. Petitioner relies upon application of : Norton v. Shelby County, 118 U.S. 425, to the instant appeal, where the Justices held: "An unconstitutional act is not law; it confers no rights, it imposes no duties; affords no protection; it creates no office; it is in legal contemplation, as inoperative as though it had never passed."

The plain language reading of the statute implicitly mandate denial predicated upon sheer fortuity. This fact was addressed by the Justices of the N.J. Supreme Court in it's decision of M.S. v. Millburn Police Dept., et al.(A-80-07) , which they held: "The Legislative intent clearly did not intend to prohibit the issuance of a firearms card under section:58-3(c)(8) because a firearm was not returned due to sheer fortuity(e.g fire, recovered lost or stolen property, etc.).

The justices further held: "A common sense reading of the statute, required that the bar to issuance of a firearm's card, be due to some fault of the Petitioner." They further reasoned: " **Only" (emphasis added) when a person's firearm is seized pursuant to the Prevention of Domestic Violence Act of 1991 and has not been returned for a reason articulated in the DV statute, is that person permanently barred from obtaining an FPIC.**" The plain language reading of the statute encompass: "There must be an overall basis for deprivation of any constitutional right." In marked contrast, Petitioner relies upon the merits of M.S. v. Millburn Police Dept , to obtain a FPIC as he has never been "convicted" (emphasis added) of any of the listed disabilities in which prohibition would be sustained.

N.J.S.A. 2C:58-3(c),provides the merits of who may obtain a (FPIC), in relevant part: "No person of good character, and good repute in the community, in which he lives, shall be denied a permit, to purchase a handgun or a firearms purchaser identification card, who is not subject to any of the disqualifying disabilities set forth in sec: 58-3(c) 1.

Sec: 58-3c (1) provides: who may not obtain:"No handgun purchase permit or firearms identification card shall be issued to, any person who has been convicted of any crime, or disorderly persons offense involving an act of domestic violence as defined in sect: 2C:25-19), whether or not armed with or possessing a weapon at the time of such offense."

" No FPIC shall be issued to any person who is: (1) Drug dependant or Suffers from a mental disorder,(2) Alcohol dependant (3) Suffers from a physical defect,(4) Falsification of application, (5) under age 21 (6) in the interest of the public, safety or welfare,(7) Any person subject to a restraining order issued pursuant to DVA of 1991. This is further reinforced pursuant to State v. J.W.D.149 N.J. 108(1997), and N.J.S.A 2C:25-21(d)(3 which warrants the merits of forfeiture and returning of seized weapons. The section: d(3) cont'd, provides:

"After the hearing, the court "shall" (emphasis added)order the return of the firearms, weapons and any authorization papers relating to the seize weapons to the owner, if the court determines the owner is not subject to any of the disabilities set forth in N.J.S.A. 2C:58-3c (1), and finds that the complaint has been dismissed at the request of the complainant,(2)and the Prosecutor determines that there is insufficient probable cause to indict,

(3) or if Defendant is found not guilty of the charges,(4) or if the Court determines that the domestic violence situation no longer exist.

Petitioner proffers he has met the qualification to obtain a FPIC for the following reasons: He does not have a criminal record, never convicted of a crime, nor indicted , never diagnosed as drug dependent, never been hospitalized for a mental disorder, or experienced other convulsive disorders; does not suffer from any physical ailments, as would prevent his safe handling of weapons, never convicted or indicted for any DV offenses, the complaint has been dismissed for (10) years, the Prosecutor did not find sufficient probable cause to indict, he was never found guilty of any charges civil or criminal, the domestic violence situation no longer exist.

These facts were made known and acknowledged by the N.J. Supreme Court, lower Court, and Appellate Courts submitted order of denial. (Appo-8).

Applying the gravamen of the above controlling statutes, N.J.S.A. 2C: 25-21 (d) 3, mandates the return and issuance of firearms and permits, to anyone who's weapons were seized pursuant to the DV Act, and not returned, upon exoneration of all charges, civil and criminal, devoid any disability impediments Therefore Petitioner is not forever barred , but entitled to receive a FPIC pursuant to the controlling statutes.

This statutory evidence was presented to the New Jersey Supreme Court throughout the entire submitted transcript of Petitioners Writ for Certification and was denied without explanation. These facts and statutory evidence were also submitted to the lower Courts along with exhibits within the submitted transcript, reinforcing his position to the Court of Appeals,

and was summarily denied.

The Court of Appeals cited arguments within its order that were raised by Respondents (Appo-p16) and attached to the Petitioner which they utilized to determine their decision and denial. The Courts decisions regarding this matter is misplaced , as their decisions are predicated upon unsubstantiated evidence and indecisiveness.

No where within the N.J Supreme Courts or lower Courts orders , do they specify or name, anyone of the (14) listed disabilities within the DVA, Petitioner is alleged to have violated, which a denial of his FPIC pursuant to N.J.S.A. 2C:58-3c(8) would stand statutory scrutiny.

CONCLUSION

The mandatory obligation facing this Court is to identify and apply the Legislative intent, to secure the objective sought, achieve and construe the act in a fashion consistent with the statutory scheme, which in this instance, would be reversal of the Court of Last resort and lower Court order's, restoration of Petitioner's rights and privileges to obtain a Firearms Purchaser Permit and Identification Card, secured by U.S. Constitution.

By: Michael Mirayes

Michael Mirayes-Petitioner

Date: October 14,2010

PETITION FOR CERTIFICATION

BRIEF

MAY 24, 2010

DOCKET NO. 065977

DOCUMENT # 1

SUPREME COURT OF NEW JERSEY
Docket No.065977
App.Div.No.A-5086-08T4

Michael Mirayes	:	CIVIL ACTION
	:	On Certification to the
Plaintiff	:	Superior Court of New Jersey,
	:	Appellate Division.
vs.	:	
	:	Sat. Below
	:	Hon: Philip S.Carchman
	:	Hon: Anthony J.Parrillo
Thomas S. Ferguson- Prosecutor	:	
Dit Mosco-A/P	:	
Warren County	:	
Pros. Office		
Defendant(s)	:	
	:	

PETITION FOR CERTIFICATION
On
BEHALF OF PLAINTIFF MICHAEL MIRAYES

Mr. Michael Mirayes
1690 Pine Ridge
BushKill,P.A.18324
(908)268-8881
Plaintiff

MICHAEL MIRAYES-Pro-Se
AND ON THE PETITION

Michael Mirayes
1690 Pine Ridge
Bush Kill, P.A 18324
(908) 268-8881
Plaintiff

May 24,2010

SUPREME COURT OF NEW JERSEY
TRENTON,NEW JERSEY

LETTER BRIEF IN LIEU OF A
FORMAL BRIEF ON BEHALF OF
Plaintiff

Honorable Judges of the Supreme Court of New Jersey
Hughes Justice Complex
Trenton, New Jersey 08625

RE: Michael Mirayes vs. Thomas S. Ferguson-Prosecutor, Dit Mosco-Assistant Prosecutor, Warren County Prosecutors Office.

SUPRA DOCKET NO.065977
Docket No.Below: A-5086-08T4

Civil Action: On appeal from denial of application for Firearms Identification Card and Purchase Permit.

Sat Below: Sat. Below: Honorable: Philip S. Carchman
Hon: Anthony J.Parrillo

Honorable Judges:

Pursuant to R.2:6-2 (b), this letter brief, in lieu of a formal brief, is submitted on behalf of the Plaintiff in support of Plaintiff's instant appeal in this matter.

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APPENDIX

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Copy of Appellate Divisions Decision . . . . .Document # 2

Copy of Plaintiff's Appellate Brief and TRO. . Document #3

Pb-Refers to Plaintiff's Brief, page #
ADO-Refers to Appellate Division Opinion, page #

STATEMENT OF THE MATTER INVOLVED

At issue, a weapons forfeiture order (which is 10yrs old),was generated by a TRO on May 10,2000 and dismissed favorably to Plaintiff on May 25,2000. Subsequently two additional orders were generated at a later date by Plaintiff's estranged spouse (R.M.) and also dismissed favorably to him .

Forfeiture order was entered against Plaintiff(M.M.)on August 19,2002. At time of incident Plaintiff was a law enforcement officer within the N.J. State Police which his personal weapons and firearms Purchaser Identification Card (FPIC) were seized and not returned, promulgated by the Prevention of Domestic Violence Act of 1991.

On August 19,2002 at forfeiture hearing, the below Court cited Plaintiff as a "danger" and would not be returning his weapons and identification card pursuant to State v. J.W.D. N.J.S.A. 2C:25-21-(d)(3). On June 02,2004 Plaintiff's Counsel of record moved before the N.J.

Appellate Division under Rule 4:50-1(e) to vacate the order of August 19,2002 and was denied. On January 31,2008 Plaintiff made application to Washington Borough Police Department for a new Firearms Purchaser Permit and Identification Card.

On May 15,2008 his application was denied predicated upon his weapons were seized pursuant to a DV complaint and not returned under N.J.S.A. 2C:58-3c(8)and N.J.S.A. 2C:25-21d(3). On May 30,2008 Plaintiff appealed his denial Pro-Se in Superior Court pursuant to N.J.S.A.2C:58-3(d) a disability cure and the recent decision by the N.J. Supreme Court and it's applicability to **M.S. v.s. Milburn Police Dept.197 N.J.236(2008)** which was summarily denied.

On March 02,2010 Plaintiff appealed denial of lower court decision to the New Jersey Appellate Division. On April 09,2010 , Appellate panel affirmed the August 19,2002 order and lower court decision. Plaintiff proffers he is exempt from N.J.S.A. 2C:58-3c(8)and N.J.2C: 25-21d(3) statute's respectively, as he was exonerated of all charges civil and criminal, as forfeiture order of August 19,2002 is no longer equitable nor has perspective application.

QUESTIONS PRESENTED

1. Does the Act improperly convert what is a criminal prosecution into a civil proceeding?

2. Does the Act specifically mandate an individual be subjected to penalties outlined by N.J.S.A. 2C:25-21d(3)or N.J.S.A.2C:58-3c(8), if a violation has not been identified or established in which it may be attached to any of the(14) disabilities enumerated within N.J.S.A. 2C: 25-19(a)?

3.The essential matter before the Court, is whether N.J.S.A. 2C:58-3(c)(8)a disability provision of the Gun Control Law enacted in January 2004 pursuant to it's terms permanently prohibit Plaintiff from being issued a FPIC, if his personal firearms were seized in a domestic situation pursuant to statute and not returned?

ERRORS COMPLAINED OF

Appellate Panel are under the misconception Plaintiff was convicted of a crime of domestic violence by the lower court pursuant to N.J.S.A.2C:25-19A and N.J.S.A. 2C;25-29 of the DVA (AP0/P#10)

N.J.S.A.2C:25-29,

The Act enumerates (14) crimes, including non indictable offenses, the commission of which constitutes domestic violence if the relationship between the actor and the victim renders the victim a person protected by the act as defined

within the listed statute. N.J.S.A. 2C: 25-19a. Domestic Violence by it's terms mean: "The occurrence of one or more of the following acts inflicted upon a person protected under this act by an adult or emancipated minor, such as :(1)Homicide,(2) Assault,(3)Terroristic threats,(4)Kidnapping,(5) Criminal restraint,(6) False imprisonment,(7)Sexual assault, (8)Criminal sexual contact,(9)Lewdness,(10)Criminal mischief,(11) Burglary,(12)Criminal trespass, (13)Harassment,(14)stalking.

The domestic violence cause is summary in nature, but subjected to criminal penalties. The Act of domestic violence charge need only be proved by a preponderance of evidence though the conduct constitutes a crime required by N.J.S.A. 2C: 25-19. At trial, the domestic violence hearing itself must accord with at least minimal requirements of due process and the court must make findings of fact, particularly credibility findings.
(See Peterson v.Peterson,374 N.J.uper.116,125(App.Div.2005) Franklin v.Slosky,385 N.J. Super.534,543(App.Div.2006).

Quoting from D.C. v. T.H. in pertinent and relevant part, the court held " All of the elements of the offense alleged as the basis for the domestic violence must be proved." (See D.C.v.T.H.,269 N.J.Super.458(App.Div.1994).

It should be so noted, every domestic violence matter must have an underlying criminal charge ranging from murder to harassment or stalking. The Supreme Court of the United States (SCOTUS) has ruled: "The State's burden of proving every element of offense in criminal prosecution cannot be shifted to the Defendant, even if the Defendant is asserting affirmative defense".

"The State in criminal prosecution is bound to prove every element of offense charged "**beyond a reasonable doubt.**" Sandstrom v. Montana, 442 U.S. at 510, 99 S. Ct. 2452.

"Conclusive presumptions conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime, Morissette v. U.S., 342 U.S. 246 at 275, 72 S.Ct. at 255, "and they invade the fact finding function".

In retrospect, as can be seen in the above cited cases, there can be no presumptions or inferences of guilt before innocence since there must be an underlying criminal charge in all domestic violence cases. If the underlying charge is withdrawn, eliminated, dismissed or negotiated away, then there is no domestic violence matter anymore.

Applying the gravamen of the Supreme Court decision pursuant to the burden of proof doctrine, N.J.S.A. 2C:25-19A,2C:25-29 of the DVA and decision of D. C.v. T.H ., 269 N.J.Super.458(App.Div.1994), the disabilities listed within the Acts are not applicable or binding to Plaintiff.

Therefore, N.J.S.A. 2C:25-19a,2C:25-29 quantifies Plaintiff has never been convicted or indicted for any of the listed disabilities enumerated by the act, which would forever preclude or disqualify him from obtaining a FPIC.

The Panel over looked several substantial issues of review cited within their opinion relevant to the instant appeal: "On May 15,2000 Plaintiff's estrange spouse(R.M.) voluntarily dismissed the complaint of DV.(ADO-p3).

In the matter of State v. J.W.D. N.J.S.A. 2C:25-21(d)(3)citied in pertinent and relevant part, explicitly mandates the return of weapons seized under forfeiture if the following exist:(1)**Both the domestic complaint is dismissed and the prosecutor finds no probable cause to convict or indict,** or(2)the defendant is found not guilty of all charges,(Pb1a)or(3)the domestic violence situation no longer exist.(State v. W.D.,149,N.J.108(1997).

The Appellate Division in State v. Volpini,291 N.J.Super,401,412-415 (App.Div.1996),held: the prosecutor commenced the action ,but the domestic violence complaint was dismissed. Never the less, the Court held even if the complaint was dismissed, the prosecutor has an opportunity to show at a hearing under the statute that probable cause exist and the weapons should not be returned.

In State v. Warrick, quoting in pertinent and relevant part the Court held: " A weapons forfeiture may not proceed if the domestic violence complaint upon which the motion is based has been dismissed. (Pb1a) Here in marked contrast, are several issues the Panel shrugged off in that statement by(R.M.) which was obviously not taken into account when the Panel weighed the competing interest in their standard of proof analysis for denial of Plaintiff's FPIC.(See State v. Warrick, Supra 283 N.J. Super.169 (Ch.Div.1995),.

Applying State v. J.W.D., Plaintiff is not subject to any of the listed disabilities enumerated within N.J.S.A. 2C:25-21d(3),2C:25-19a or N.J.S.A. 2C:58-3c(8). (See State v. J.W.D. 149 N.J. 108(1997). Plaintiff is an adult, but does not fall within the list of crimes generated by N.J.S.A.2C:25-29 as an offender. N.J.S.A 2C:25-19a, outlines the 14 disabilities enumerated by the Act in which an individual may be charged with an act of domestic violence by it's terms.

Plaintiff has never been convicted of any listed offense as defined pursuant to statute's N.J.S.A. 2C:25-19a and 2C:25-29(Pb1a) (ADO-p8). In Chernesky v. Fedorczyk the Court held "A defendant cannot be found guilty of an act of domestic violence unless the factual basis has been established as in the case of guilty pleas.(See Chernesky v.Fedorczyk,346 N.J. Super.34,40-41(App.Div.2001).

In State v. Fuchs the Court held: "In order for a court to find that a defendant committed an act of harassment as proscribed by that statute, the court must find that the person had a "conscious objective" to harass the plaintiff'.(See State v.Fuchs,230 N.J.Super.420,428 (App.Div.1989).

Applying Chernesky, Plaintiff is not an offender of the domestic violence act by it's terms under statute N.J.S.A. 2C:25-19a,or 2C:25-29. Under statute N.J.S.A.2C:25-19(a) it defines domestic violence: "As the commission of any one of the 14 crimes and offenses enumerated by the Act." It has never been established or proven Plaintiff was convicted or indicted for any of the listed disabilities within the act which domestic violence could be affirmed.

Therefore, under statute N.J.S.A 2C:25-19(a), 2C:25-29,2C:58-3c(8) 2C:39-7 does not prohibit Plaintiff from obtaining a FPIC. Plaintiff hereby disagree with Appellate panels decision predicated upon their reliance of testimony by complainant(R.M)assertions of domestic violence void of any binding or definitive evidence.

II

The Appellate Panel neglected to address the forfeiture order of August 19,2002 to ascertain if it have perspective application or is it equitable pursuant to N.J.S.A.2C:25-19A, 2C:25-29, 2C:25-21d(3)or N.J.S.A. 2C;58-3c(8).

On May 25,2000 complainant (R.M.) voluntarily dismissed restraining order(TRO),(ADO-P2)(Pb1a). As noted previously (R.M.)signed two additional complaints at later times and they too were summarily dismissed favorably to Plaintiff (M.M.)as no acts of domestic violence could support the claim.(Pb1a)(ADO-p2). Applying J.W.D., the path

for return of weapons seized during forfeiture are:

The court must determine the owner is not subject to any of the disabilities set forth in N.J.S.A. 2C:58-3c or(8):(1)**the complaint has been dismissed at the request of the complainant,**(2)the Prosecutor determines that there is insufficient probable cause to indict,(3)if Defendant is found not guilty of the charges,(4)or if the Court determines that the domestic violence situation no longer exist." N.J.S.A 2C:25-21d(3) prohibits offenders in which the forfeiture disabilities apply from obtaining firearms.

Pursuant to the disabilities outlined within above Statute's, Plaintiff is not an offender, has not been indicted, nor found guilty of any charges civil or criminal, and the domestic violence situation no longer exist. Therefore, pursuant to statute's N.J.S.A.2C:25-21d(3)and 2C:58-3C(8)does not prohibit Plaintiff from obtaining a FPIC.(See State v. J.W.D. 149 N.J. 108(1997).

On August 19,2002 at forfeiture hearing (R.M.)objected to return of Plaintiff's weapons, testifying she remained " very scared of him". (M.M & R.M. divorced in 2000)(ADO-p3).

Additionally (R.M.) alleged in one incident "(M.M.) came to her work yelling and screaming with his hand on his service weapon". She further allege on another occasion where "(M.M.) punched her in the eye, and whacked her right across the leg"; and another where(M.M.)returned from a carnival intoxicated and "viciously beat" her resulting in bruises across much of her body.(ADO-P3).

In referencing to the analysis and rationale of M.S. v. Millburn P.D., the Justices within the N.J Supreme Court reasoned in stark contrast with the instant appeal, non of the required steps were taken by the Prosecutors Office or Police Dept. in which to substantiate an act of DV,(1)No criminal complaints were issued or filed,(2)Plaintiff was never prosecuted for any weapons offense relating to

seizure of weapons,(3)the consent order does not prohibit Plaintiff from purchasing or possessing firearms in the future,(4)The order does not have any legal impediments prohibiting Plaintiff from obtaining a FPIC or purchasing weapons in the future.

(5) The order does not cite any evidence of Police reports generated to support(R.M'S)claim of injuries or acts of DV,(6)The order does not cite any binding evidence of Doctors reports, or medical records as evidence of an assault or DV offense took place.(7) The order does not cite any evidence of arrest reports of Plaintiff to affirm an act of domestic violence occurred pursuant to the relevant statutes.

(8) The order does not refer to any indictments submitted by Prosecutors as evidence of a DV offense.(9) No documents were submitted by Prosecutors identifying Plaintiff as a threat or continued threat pursuant to statute.(10)The order does not cite any offense committed by Plaintiff with the use of firearms.

The Justices further held: The Prosecutors or the Court could have moved or revoked Plaintiff's right to possess weapons for any of the reasons then articulated within the statute of N.J.S.A.2C: 25-19a,2C:58-3(c)or 2C: 58-3c(8)but were negligent. Applying M.S. v. Millburn P.D., Forfeiture Order of August 19,2002 is void of perspective application, no longer equitable and no longer re-enforce the impediments promulgated pursuant to N.J.S.A.2C:58-3C(8)in which to forever prohibit Plaintiff from obtaining a FPIC.(M.S. v. Millburn Police Dept.,197 N.J.,236 (2008).

Quoting N.J.S.A.2C:25-29, " A finding that one of the offenses listed in 2C:25-19 does not automatically warrant the entry of an order pursuant to this section." The Act of domestic violence charged need be proved only by a preponderance of the evidence though the conduct

constitutes a crime as required by N.J.S.A. 2C:25-19. Never the less, all of the elements of the offense alleged as the basis for the domestic violence must be proved.(See Roe v. Roe,253 N.J.Super.418(App.Div.1994).

During the hearing (M.M.) denied he committed and act of domestic violence by it's terms, but did acknowledge " it was purely accidental and not intentional when he elbowed his wife in the eye after she jumped on his back" while engaged in a innocent romp of Tom foolery and horseplay.

Quoting in reference to a similar incident in contrast to the instant appeal: "**Merenoff v. Merenoff**" where Mr. Merenoff accidentally injured his wife with a hedge trimmer and a personal injury action was commenced against him by his spouse. The Court recognized that there are certain unique aspects of marital relationships which do not exist in other relationships. The Court held that spouses "enjoy mutual liberties" with one another and that certain behavior between married persons is acceptable and reasonable even though such conduct might be unreasonable if engaged in by unmarried persons."

As stated by the Supreme Court: "Certain conduct may be regarded as "Consensual" involving give and take and subtle ebb and flow of marital life. In these areas, courts and juries cannot be expected to grasp sensibly and consistently the acceptable norm of married, living or chart the parameter of reasonable marital behavior as a predicate for affixing a liability in tort. Merenoff v.Merenoff,76 N.J.535 Supra.(1978).,Plaintiff admitted the incident was accidental and without malice.

As noted in **M.S. v. Millburn**, The Prosecutors or the Court could have moved or revoked Plaintiff's right to possess weapons for any of the reasons then(2000-2002) articulated within the statute of N.J.S.A.2C:25-19a,2C:58-

3(c) or 2C:39-7 and were negligent. Applying the merits of **Merenoff** and **M.S. v. Millburn P.D.**, N.J.S.A.2C: 25-19a,2C:25-21d(3),2C:58-3c(8)Plaintiff is not a violator. So under the above statutes by their terms does not prohibit Plaintiff from obtaining an FPIC.

Plaintiff, also explained as back ground for the TRO, he was constantly harassed on a daily basis telephonically in 2002, at his work place from irate and over zealous Debt collectors threatening him with Court action for delinquent payments of debt in which he was unaware.

Upon confronting (R.M.)with the matter she became defensive and threatened him with a " messy divorce and making a false report of domestic violence." (ADO-P4)(Pbp6),(It should be so noted time of incident was in 2000 which precipitated the DV action)(Pb1a).

At the close of forfeiture hearing, the sitting Judge credited (R,M.'s) account ,citing she found (M.M) posed a danger to (R.M.) even through she had sought dismissal of the TRO, citing:

> " So under State v. J.W.D., The Court won't be" returning the personal weapons to Mr. (M.M.) because of the – based upon the testimony of Ms. (R.M.)she was shaking and scared. I could see it from where I sit on the witness stand. I believe her, what she described, in fact, happened. The Court finds he's a danger to her."

Danger: as defined in Webster's Collegiate Dictionary describes it as follows, in pertinent and relevant part: "Danger implies possible but not necessarily inescapable harm." N.J.S.A. 2C:25-29 specifically cite: If the finding that an act of domestic violence has occurred,it is to be based upon a stipulation or admission of the defendant, the judge must ensure that there is a factual basis for entry of an order.

The defendant should be sworn, and the procedure employed should be similar to that for a guilty plea.(See Chernesky v.Fedorczyk,346 N.J. Super.34,41-42 (App.Div.2001).

Quoting Bresocnik v.Gallegos in pertinent and relevant part: "The present case is an unfortunate example of the trivialization of the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to-35. That law is not designed to interdict all forms of unpleasant exchanges between parties. The law has serious consequences to the personal and professional lives of those who are found guilty of what the Legislature has characterized as "a serious crime against society".

N.J.S.A. 2C:25-18, Although the finding of domestic violence is essentially a civil determination, an accused is subject to arrest, N.J.S.A. 2C:25-21b, and is subject to fingerprinting once a final restraining order is entered, N.J.S.A. 2C:53-1-15. The order itself can impose wide reaching sanctions on the defendant.(See Bresocnik v.Gallegos,367 N.J. Super. 178,183-184 (App.Div.2004).

N.J.S.A. 2C: 25-19a: Domestic Violence by it's terms mean:

"The occurrence of one or more of the following acts inflicted upon a person protected under this act by an adult or emancipated minor, such as :(1)Homicide,(2) Assault,(3)Terroristic threats,(4)Kidnapping,(5) Criminal restraint,(6) False imprisonment,(7)Sexual assault,(8)Criminal sexual contact,(9)Lewdness,(10)Criminal mischief, (11)Burglary,(12)Criminal trespass,(13)Harassment (14)stalking.

N.J.S.A. 2C:25-21d(3) : "In the Matter of return of weapons to J.W.D.," The Act is procedurally binding and explicitly mandates the path in which return of weapons and identification cards are to be returned.

"After the hearing the court "shall" order the return of the weapons and any authorization papers relating to the seized weapons to the owner, if the court determines the owner is not subject to any of the disabilities set forth in N.J.S.A. 2C:58-3(c):(1)finds that the complaint has been dismissed at the request of the complainant,(2)the Prosecutor determines that there is insufficient probable cause to indict,(3)if Defendant is found not guilty of the charges,(4)or if the Court determines that the domestic violence situation no longer exist."

N.J.S.A. 2C:58-3(c): The statute provides: "No person of good character and good repute shall be denied a permit to purchase a handgun or a firearms purchaser identification card, unless found to be subject to any of the disabilities set forth in N.J.S.A 2C:58-3c(8). N.J.S.A. 2C: 58-3C Encompass the listed disqualifying disabilities:(1)criminal conviction,(2)drug or alcohol dependency,(3)mental disorder,(4)physical or psychological handicap,(5)domestic violence order proscribing possession of firearms, and other undefined problems where issuance of a permit would be inconsistent with the public safety and welfare.

Statute N.J.S.A 2C:25-19a describe the listed disabilities within the DVA, which an offender is precluded from obtaining a FPIC. However "Danger is not a listed disability unless it is attached to any one of the listed offenses. Statute N.J.S.A. 2C:25-21d(3)encompass the path within the DVA in which firearms may be returned if any of the listed disabilities of the act are not met.

Statute N.J.S.A. 2C:58-3c gives authorization to anyone to possess firearms if not disqualified from the listed

disabilities within the statute. Applying the above statutes by their terms, Plaintiff does not meet the relevant standards of disqualification. Therefore, applying statutes N.J.S.A .2C:25-19a, 2C:25-21d(3), 2C:25-29, 2C:58-3c, 2C:58-3C(8),Plaintiff is not forever prohibited from obtaining a FPIC.

In May 2000 and August 2002 there does not appear to have been any legal impediments prohibiting Plaintiff from obtaining a firearms identification card or permit to purchase weapons. Plaintiff does not fall within the disqualifying disabilities within the above citied statutes. Therefore, applying N.J.S.A.2C:25-19A, 2C:25-21d(3),2C:58-3c, 2C:58-3c(8),by there terms does not prohibit Plaintiff from obtaining a FPIC pursuant to the DVA or relevant N.J. Gun Law's enacted in 2004.

It should be so noted restraining orders are applied for and granted at alarming rates these days. They are highly abused and misused as leverage in matrimonial, and child support cases as noted by the Justices in Murray v. Murray,267 N.J. Super.406 App.Div.1993),State v. Volpini 291 N.J. Super.401(App.Div.1996), Carfagno v.Carfagno 288 N.J Super.424 (Ch.Div.1995)

At issue, the present legislation is void of any safeguards to protect innocent victims within law enforcement and the public from the routine practice of filing counter claims of domestic violence for retaliatory purposes by offenders. This is a well known recognized and accepted practice among law administrators aware of the abuse and have neglected to take any corrective action.

The N.J. Domestic Violence Act of 1991 does not delineate or identify any particular gender, ethnicity, sexual orientation, race, creed or color in which it is or isn't applicable. It specifically identify the definition of it's applicability to offense, crime, victim or offender

pursuant to statute. However, it does not promote, instruct nor warrant any avenues for retribution, abuse or violation of any individuals rights protected under the New Jersey and United States Constitution. Example: Quoting from an article printed within the New Jersey Law Journal.

On or about April 23-24 1995,the article cited this statement made by the Justice instructing the class at a seminar held in N.J. The seminar held at the Hughes Justice complex in Trenton ,N.J. was a training and instructional class for Judges. A contingent of Municipal Justices received instructions regarding the issuance of restraining orders in domestic violence matters.

During the seminar they received instructions from a then Municipal training Judge (Richard Russell)who made public a statement within a article of the N.J. Law Journal.

The article cited this comment by Russell to the justices: "Your job is not to become concerned about all the constitutional rights of the man that you are violating as you grant a restraining order. Throw him out on the street, give him the clothes on his back and tell him 'See ya' around."

This is in stark contrast to the statutory scheme of N.J.S A 2C: 25-29 " protection of the victim, not punishment of the offender". Carfagno v.Carfagno 288 N.J Super.424 (Ch.Div.1995)

Reasons why certification should be allowed

As shown above, the within matter involves a plethora of constitutional issues that demand resolution by New Jersey's highest Court. Moreover, the injustices suffered by Michael Mirayes and thousand of others just like him demand to be recognized and have justice administered and his right to bear arms restored.

Comments on the Appellate Division's Opinion

Throughout the Appellate Divisions decision, the panel evinced a dismissive ness about the effects TRO'S impact on an individual charged under false pretense's when the evidence does not support the facts. In part it was this dismissive ness, which that prevented it from adequately addressing the important question before it.

At the same time, it neglected to address the Legislative intent and give it the critical examination they deserve as it pertains to the rules of law governing, evidence, burden of proof, issuance of TRO's and seizures of weapons.

CERTIFICATION

I certify that this petition presents a substantial question and is filed in good faith and not for the purpose of delay pursuant to R. 2:12-7 (1).

Michael Mirayes-Pro-Se

BY:

Michael Mirayes-Plaintiff

Dated: May 24,2010

CERTIFICATION OF SERVICE

I, hear by certify, that the within pleading, has been filed, and copies, this date have been served upon, all parties, and Counsel of Record, as prescribed by the Rules of Court. I hear by further certify the foregoing statements made by me are true. I am aware, if any of the foregoing statements made by me are willfully false, I am subject to punishment. Copies of this document was served this day by certified mail upon:

cc:
Thomas S. Ferguson-Prosecutor
Dit Mosco-Assistant Prosecutor
Warren County Pros. Office
Warren County Courthouse
Second Street
Belvidere, N.J. 07823

By: Michael Mirayes

Date: May 24,2010

NEW JERSEY APPELLATE DIVISION

FINAL DECISION

AND DENIAL

DECIDED APRIL 09, 2010

DOCUMENT # 2

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5086-08T4

IN THE MATTER OF APPLICATION OF M.M.
FOR FIREARM'S IDENTIFICATION CARD

Submitted March 2, 2010-Decided April 9,2010
Before Judges Carchman and Parrillo.

On appeal from Superior Court of New Jersey, Law Division,Warren County, Docket No. A-16-08-2121.

M.M., appellant pro se.

Thomas S.Ferguson, Warren County Prosecutor, attorney for respondent (Dit Mosco, Assistant Prosecutor, Of counsel and on the brief).

Per Curiam

Appellant M.M. appeals from orders of the Law Division denying his application for a firearms purchaser identification card (FPIC) and subsequent motion for reconsideration. We affirm.

These are the pertinent facts. Appellant is a former New Jersey State Police Officer. On May 10,2000, his wife, R.M, obtained a temporary restraining order(TRO) against him pursuant to the Prevention of Domestic Violence Act of 1991

(Act), N.J.S.A. 2C:25-17 to-35. When served with the TRO, his three firearms were seized. Because appellant was a law enforcement officer, his service weapon was retained by the State Police pending the outcome of an internal investigation into his fitness to possess his duty weapon, while his personal firearms were released to the Warren County Prosecutor's Office, pursuant to the Act's provision, N.J.S.A.2C:25-21 (d) (2).

On May 15, 2000, the County Prosecutor filed a petition seeking forfeiture of all seized weapons and appellant's FPIC. The hearing was stayed pending the outcome of the State Police's internal investigation. During the course of this investigation, appellant's wife dismissed the TRO. She claimed to have done so because appellant "promised to leave me alone and just go away. . . ."

On November 16,2000, the Attorney General, after reviewing the results of the State Police internal investigation, authorized the return of appellant's service weapon without restriction.

Sometime thereafter, another domestic violence incident involving appellant was reported to the State Police, who then disclosed the matter to the Attorney General. Following a series of interim decisions as to appellant's fitness to carry his service weapon, on April 30,2002, the Attorney General's Office authorized appellant to carry his service weapon both on and off duty without restriction.

Following this decision, the County Prosecutor moved in the Law Division for a weapons forfeiture hearing to determine whether appellant's personal weapons should be returned.

The forfeiture hearing was held on August 1,2001. R.M., who by then was divorced from appellant, objected to the return of appellant's personal weapons. She testified that she remained "very scared" of her former husband . Although there had been no further violent incidents between them since May 9,2000, appellant continued to be verbally abusive.

R.M. described a recent incident where appellant came into her work place " yelling and screaming" with his hand on his [service] weapon[.]" R.M. also recounted a lengthy history of domestic violence during their marriage, including an incident where he "whacked" her "right across the leg"; and yet another where she was viciously beaten by him after he returned home from a carnival intoxicated, resulting in bruises across much of her body.

As to the incident underlying the May 10,2000 TRO, R.M. testified that on May 01,2000, as she was leaving for work, appellant came running out of the house, grabbed her by the arm, and became verbally abusive, calling her " a c**t, aa whore" and a " f***ing bitch." During the altercation, appellant also stated that he was "not going to take it anymore." R.M. had marks up and down the arm where the appellant had grabbed her.

Appellant testified on his own behalf, denying R.M.'s allegations of domestic violence. He did acknowledge, however that on one occasion, he had given his ex-wife a black eye, but explained that it was 'purely accidental[,]" as he mistakenly elbowed R.M. in the face after she jumped on his back.

Regarding the incident underlying the TRO, appellant explained, as background, that his wife had been taking money from him, was threatening him with a messy divorce," and was planning on making a false report of domestic abuse. As to the incident itself, appellant admitted that he had" reached for his [ex-wife's] elbow," but that was not in "any forceful manner at all."

According to appellant, he voluntarily turned in his personal weapons to the State Police because he was afraid of what his wife would do with them if he left them in the marital home.

At the close of evidence, the judge, crediting R.M.'s account, found that the appellant posed a danger to his ex-wife, even though she had previously sought dismissal of the TRO.

Citing In re return of weapons to J..W.D., 149 N.J. 108 (1997), the court, by order of August 19,2002, directed that appellant's personal weapons and FPIC be forfeited.

Appellant's motion for reconsideration was denied without prejudice for failure to properly serve the state.

Two years later, however, on June 2,2004, appellant moved under Rule 4:50-1 (e) to vacate the August 19,2002 forfeiture order.

Following argument, the court denied the motion by order of June 29,2004. Appellant then moved for reconsideration, claiming changed circumstances including: 1, his divorce from R.M.; 2)his long term relationship with a new girlfriend; 3) the absence of any recent allegations of abuse; 4) the lack of evidence of any physical threat to R.M.; 5) their "mutually tolerant" contact post –divorce concerning their children; and 6) the full use of his service weapon, without incident, since the weapons forfeiture hearing.

Appellant further argued that denying him the ability to obtain a possess personal weapons would cause extreme and unanticipated hardships as well as impact his employment and constitutional rights. The state opposed the application, arguing that relief was not warranted under Rule 4:50-1, citing N.J.S.A.2C: 39-7 and N.J.S.A. 2C: 58-3, which prohibit persons whose weapons have been seized and not returned under the Act from obtaining firearms licenses and possessing personal firearms, but still permit such persons to possess duty weapons for employment with a police force, the National Guard, or military service.

Following a hearing, the judge denied the motion to vacate the forfeiture order. The court reasoned:

> What the defendant must now show is that not only have circumstances changed such that he is no longer a danger to his former spouse, but also that he will suffer extreme and unexpected hardship if he is not able to possess personal weapons.
>
> The court does not need to address whether or not the alleged facts asserted in The defendant's Brief are a change in circumstance because the defendant did not certify to such facts. Secondly, the defendant did not show how he will suffer extreme and unexpected hardship if he is not permitted to possess personal firearms. . . .
>
> The defendant also argues that any restriction of his constitutional rights is itself an extreme and unexpected hardship. The defendant does not, however, have a personal ,individual constitutional right to bear arms. . . . [T]he Second Amendment does not guarantee an individual's right to bear arms . . . .
>
> [(Emphasis added).]

We affirmed the Law Division's order, and the Supreme Court denied certification.

On January 31,2008, appellant applied to the Washington Borough Police Department for a new FPIC. His application was denied on May15,2008,based on the fact that his weapons had been previously seized pursuant to a complaint of domestic violence and had not yet been returned under N.J.S.A. 2C: 58-

3c (8). See N.J.S.A. 2C:25-21d (3). Appellant appealed that denial, and the Law Division denied the appeal on the papers, without a hearing , on August 7,2008.

Appellant then moved for reconsideration, for change of venue and recusal of the Assistant Prosecutor. The latter two motions were denied. A hearing was held on the reconsideration motion after the parties submitted supplemental briefing on the applicability of M.S. v. Millburn Police Dep't, 197 N.J. 236 (2008) and District of Columbia v. Heller,____U.S.___,128 S. Ct. 2783. 171 L. Ed. 2d 637(2008), to the case at bar.

Following the hearing on April 30 ,2009, the judge denied appellant's reconsideration motion in a written opinion of May 15,2009, wherein the court reasoned:

> Here, a hearing was held [on August 1, 2002] the [appellant was present, the State presented its evidence, and the [appellant] was able to cross –examine the witness testifying against him. . . .
>
> . . . .
>
> . . . . The [appellant] was afforded another hearing before the court in 2004. When [the judge] issued her decision on February 10, 2005, she based her decision to Deny the plaintiff's motion to vacate on two separate factors: 1) the defendant had failed to certify to the facts in support of his claim of changed circumstances; and,2) the defendant was unable to establish that he would suffer extreme and unexpected hardship because he did not have a personal

> right to bear arms under the Second Amendment of the United States Constitution. . . .
>
> . . . .
>
> . . . .Here, the [appellant] has not been convicted of any crime. [The judge's] decision to deny the [appellant's] motion to vacate the order forfeiting his personal weapons turned, in part, upon the court's conclusion that his right to bear arms was not a personal right. At the present moment, this court is not in a position to change it's decision denying the [appellant's] appeal of the Washington Borough Township's denial of his application for a FPIC. That denial was based upon the laws of the State of New Jersey and it is this court's duty to apply the laws of this State. As the law stands, in its current state of flux, this court cannot find that Heller applies to this[appellant].

This appeal follows, in which appellant argues: (1) his Constitutional right to bear arms bar entry of the forfeiture Order under Heller; (2) he is not disqualified from possessing a FPIC by virtue of N.J.S.A. 2C:25-21d (3) or N.J.S.A. 2C:58-3c (8) because he is not subject to a domestic violencerestraining order; and (3) the application of N.J.S.A. 2C:58-3c (8), which was not in effect at the time of the 2002 forfeiture judgment, violates the ex post facto clauses of the United States and New Jersey Constitutions. U.S. Const. art. I, s 10, c1, 1; N.J. Const. art. IV, S 7, 3. We find none of these contentions Persuasive and therefore affirm.

In Heller, supra, the issue was whether the Second Amendment protects only the right to possess and carry a firearm in connection with military service or also protects an individual's right to possess a firearm for other purposes such as self – defense and hunting. Id. at __, 128 S. Ct. at 2789,171 L. Ed. 2d at 648.

The court held that the Second Amendment Protects "an individual right to keep and bear" firearms, id. at ___, 128 S. Ct. at 2799, 171 L. Ed. 2d at 659, and that this holding required invalidation of District of Columbia statutes that totally prohibited handgun possession in the home and required "any lawful firearm in the home [to] be disassembled or bound by a trigger lock at all times, [thus] rendering it inoperable." Id. at___, 128 S. Ct. at 2817-22, 171 L. Ed. 2d at 679-84.

However, the Court expressly indicated that it's holding did not require invalidation of statutes that require a license to purchase or possess a firearm. Id. at __, ___, 128 S. Ct. at 2816-17, 2819, 171 L. 3d. 2d at 678, 680-81. In fact, the Court noted that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." Id. at ___, 128 S. Ct. at. 2816, 171 L. Ed. 2d at 678.

Thus. nothing in the Heller opinion "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." Id. at ___, 128 S. Ct. at. 2816-17, 171 L. Ed. 2d at 678.

Based on this reasoning, we recently found that Heller had "no impact upon the constitutionality of N.J.S.A. 2C: 58-3(c) (5)." In re Dubov, 410 N.J. Super. 190, 197 (App. Div. 2009).

In Crespo v. Crespo, the defendant argued that the Act effects a deprivation of an individual's Second Amendment right to bear arms because it allows for the seizure of a defendant's firearms upon a finding of domestic violence. 408 N.J. Super. 25,41 (App. Div. 2009), aff 'd, __ N.J. ___ (2010).

We found nothing in the Supreme Court's decision in Heller that suggests a limitation " on a state's right to bar persons who have been found to have committed acts of domestic violence from

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1 No handgun purchase permit or firearms purchaser identification card shall be issued :

. . . .

(5) To any person where the issuance would not be in the interest of the public health, safety or welfare . . . .

[N.J.S.A. s 2C: 58-3c (5).]

possessing firearms." Id. at 43. Even assuming the Second Amendment applies to the states, we determined that, "[a]bsent a clear and binding announcement from the Supreme Court of the United States to the contrary,. . .the Act's prohibition on the possession of firearms by a person found to have committed domestic violence is a valid, appropriate[,] and sensible limitation on an individual's Second Amendment rights." Id. at 43.

Our decision was affirmed by the Supreme Court. Crespo, Supra, ___N.J. at ___. In upholding the Act's constitutionality, the Court stated:

> To the extent defendant raised whether the Second Amendment's right to bear arms, U.S. Const. amend. II, applies to the states, id. at 41-43, we note that the issue of " [w]hether the Second Amendment right to keep and bear arms is incorporated as against the states by the Fourteenth Amendment's privileges or Immunities or Due Process Clause" presently is pending before the Supreme Court of the United States. McDonald v. City of Chicago, 567 F.3d 856 (7th Cir.2009), cert. granted, ___ U.S. __, 130 S, Ct. 48, 174 L. Ed. 2d 632 (2009) . We need not reach that point because the right to possess firearms clearly may be subject to reasonable limitations. See District of Columbia v. Heller, __ U.S. __, ___, 128 S. Ct. 2783, 2816-17, 171 L Ed. 2d 637, 678 (2008) (holding that "[l]ike most rights, the right secured by the Second

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2 See also Maloney v. Cuomo, 554 F.3d 56, 58-59 (2d. Cir.2009).

> Amendment is not unlimited" and endorsing " longstanding prohibitions on the possession of firearms").
> [Id. at 8-9.]

Accordingly, we find no constitutional violation per se in either the seizure of appellant's weapons or the denial of a FPIC.

(II)

Relying on M.S. v. Millburn Police Dep't, 197 N.J. 236 (2008), appellant next contends that he is not disqualified from possessing a FPIC by virtue of N.J.S.A. 2C:25-21d (3) or N.J.S.A. 2C:58-3c (8) because he is not subject to a domestic violence restraining order. We disagree,

N.J.S.A. 2C:58-3c provides: No handgun purchase permit or Firearms purchaser identification card shall be issued . . . . (8) [t]o any person whose firearm is seized pursuant to the ' Prevention of Domestic Violence Act of 1991, and whose firearm has not been returned." To be sure, an applicant is not permanently barred from obtaining a FPIC or possessing a firearm simply because his firearms had been seized under the Act and not returned.

M.S., supra, 197 N.J. at 246. Rather, it is "[o]nly when a person's firearm is seized pursuant to the [Act] and 'has not been returned' for a reason articulated in the Domestic Violence Forfeiture Statute[(DVFS)], N.J.S..A. 2C: 25-

21(d) (3)," that the person is "permanently barred from obtaining a firearms card." Id. at 251. " Therefore, under N.J.S..A. 2C:58-3(c) (8), the reason for not returning a firearm could be established by proving any ground in support of a forfeiture at a proceeding conducted pursuant to N.J.S.A. 2C:25-21 (d) (3) . . . ." Ibid.

Under the DVFS, a prosecutor may object to the return of weapons seized under the Act " on grounds that . . . the owner poses a threat to the public in general or a person or person in particular." N.J.S.A 2C:25-21d (3). Weapons are only returnable if the Court finds both "the owner is not subject to any of the disabilities set forth in N.J.S.A. 2C:58- 3c and. . . .the court determines that the domestic violence situation no longer exist." Ibid. Thus, at a hearing under the DVFS,

> if the [prosecutor] could show that plaintiff fell within any of the disability categories of N.J.S.A. 2C: 58-3(c) or that he was " unfit" or that he pose[d] a threat to the public," then the reason for forfeiture of plaintiff's weapons and the revocation of his card would be established. If the [prosecutor] did not meet any of those standards for the forfeiture of a firearm or revocation of a firearms card, then at the conclusion of the hearing, pursuant to N.J.S.A. 2C:25-21 (d) (3),
>
> > a court would be required to " order the return of the firearms, weapons, and any authorization

> papers relating to the seized weapons to the owner if the complaint has been dismissed at the request of the complainant and the prosecutor determines that there is insufficient probable cause to indict; or if the defendant is found not guilty of the charges; or if the court determines that the domestic violence situation no longer exist." [M.S., supra, 197 N.J. at 248 (quoting L. 1991, c. 261, s 5) (footnote omitted and emphasis partially added).]

Accordingly , following a hearing, forfeiture of weapons and a FPIC may be ordered if a court finds that the domestic violence situation continues to persist. Id. at 49,251 (citing N.J.S.A. 2C: 25-21d (3)).

> A commonsense reading of the statute requires that N.J.S.A. 2C:58-3 (c) (8)'s bar to the issuance of a firearms card be due to some fault of plaintiff. Therefore, in this case, at a forfeiture hearing in 1997, had plaintiff's firearms "not been returned" because plaintiff had not been found guilty of a crime related to the domestic violence incident, because there was 'probable cause to indict," or because the "domestic violence situation continued after the issuance of the mutual restraining orders, see N.J.S.A. 2C:25-21(d) (3), then the conditions of N.J..S.A. 2C: 58-3 (c) would have been met. [Id. at 251 (emphasis added).]

In M.S., the appellant's firearms were seized in 1997 after he was issued a domestic violence complaint and restraining order. Id. at 238. There after, the criminal charges were

dismissed, and the restraining order was dissolved. Id. at 249. The applicant then entered into a consent judgment permitting him to either sell the firearms or surrender title to the weapons. Id. at 238.

The consent judgment, however, contained no stipulation by the applicant that his FPIC was subject to forfeiture, and no hearing was held to determine whether plaintiff committed an act that disqualified him from obtaining a firearm. Id. at 239. In 2005, the police refused to return plaintiff's firearms card, on the ground that his " previously seized weapons were not returned and therefore he was permanently barred from possessing a firearm under N.J.S.A. 2C: 58-3 (c) (8). . . ." Ibid.

The Appellate Division agreed and the Supreme Court reversed, remanding the matter to the Law Division to conduct a hearing to determine whether the prosecutor's Office would have succeeded at the N.J..S.A. 2C: 25-21(d) (3) forfeiture proceeding in proving that the applicant had committed an act warranting forfeiture of his firearms. Id. at 252.

Here, in marked contrast, a reason for forfeiture and denial of the FPIC, as articulated in the DVFS, had been established at a hearing, wherein it was determined that appellant was a continuing threat to R.M., and that, as a result, the domestic violence situation persisted. There was

substantial credible evidence supporting these findings, which, in turn, established sufficient grounds for the forfeiture of appellant's personal firearms and the denial of a FPIC, even though there was no final restraining order in effect. See J.W.D., SUPRA, 149 N.J. at 116-18; State v. Freysinger , 311 N.J. Super. 509, 516 (App. Div. 1998).

(III)

Lastly, appellant argues that because the restraining order was issued prior to the 2004 addition of N.J.S. A. 2C: 58-3C, he should not be barred from obtaining a FPIC. We disagree.

The prohibition against ex post facto laws applies only to penal or criminal statutes, not to regulatory provisions. U.S. v. Ward, 448 U.S. 242, 248-49, 100 S. Ct. 236, 2641, 65.L. Ed. 2d 742,749 (1980); State v. Muhammad, 145 N.J. 23,56, (1996); Doev. Poritz, 142 N.J. 1, 46 (1995). In our opinion in M.S. v. Millburn Police Dep't, we concluded that the provision in issue, N.J.S.A. 2C:58-3c (8) , should be applied:

> because it was the governing law at the time that M.S. moved for the return of the FPI. It is inconsequential that up until January 4,2004, the prohibition set by section 3c (8) did not exist. The Legislature, by enacting that section, provided the standard to be applied for future application for a FPI, or by inference, returned of a seized FPI. In deciding M.S. application , which was filed in 2005, the judge had to apply the existing standard. By its terms, N.J.S.A 2C:58-3c (8) applies to prior

> seizures of firearms. Yet, there is nothing in the statute that "grandfathers in" seizures that preceded the enactment of this section. Moreover, such an exemption would not advance the policy embodied in section 3c(8). [395 N.J. Super. 638, 642-43 (App. Div. 2007), rev'd on other grounds, 197 N.J. 236 (2008).]

The Supreme Court agreed with this analysis:

> Although we disagree with the Appellate Division's literal interpretation of the language of N.J..S.A. 2C: 58-3 (c) (8), we do agree that N.J.S.A. 2C: 58-3 (c) (8), as a regulatory provision, is law governing this case. See In re Preis, 118 N.J. 564, 568, (1990) ("We have repeatedly referred to New Jersey's gun-control laws as a careful grid' of regulatory provisions". (citation omitted)).
>
> Accordingly, all persons seeking issuance of a firearms permit must be in compliance with that statute as of the date of it's enactment, January 14,2004.
>
> [M.S., supra, 197 N.J. at 252 n.14.]

Therefore, although the TRO against appellant was issued prior to the January 2004 addition of N.J.S.A 2C: 58-3 c (8), appellant is still barred from obtaining an FPIC, as the ex post facto doctrine does not apply to this regulatory provision .

(IV)

We find no merit to appellant's remaining arguments. R. 2:11-3 (e) (1) (E).

Affirmed

"S/ " _____

Clerk of the Appellate Divison

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I hereby certify that the foregoing is a true copy of the original on file in my office.

NEW JERSEY SUPREME COURT

PETITION FOR CERTIFICATION

ORDER OF DENIAL

DOCKET # 065977

DECIDED JULY 15, 2010

DOCUMENT # 3

SUPREME COURT OF NEW JERSEY
C-118 September Term 2009
065977

IN THE MATTER OF APPLICATION OF
M.M. FOR FIREARM'S IDENTIFICATION
CARD

ON PETITION FOR CERTIFICATION

FILED

(M.M., -PETITIONER)

JUL 19 2010

"S/" _____
CLERK

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-005086-08
having been submitted to this Court, and the Court

having considered the same;

It is ordered that the petition for certification is denied, with costs.

Witness, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 15th day of July, 2010.

"S/"_____
CLERK OF THE SUPREME COURT
The foregoing is a true copy
of the original on file in my office.
"S"_____
CLERK OF THE SUPREME COURT
OF NEW JERSEY